Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

MICHAEL LLOYD,

Petitioner,

vs.

RONALD LEVINE, Assistant United States Attorney; HARVEY BARTLE, III, Judge, United States District Judge; JOHN HURLEY, Warden, FCI — Fort Dix; RICKY McINTOSH, Unit Manager, FCI — Fort Dix; WILLIAM LANGEHENNING, Acting Unit Manager, Senior Case Manager, FCI — Fort DIX; FRANK GALLAGHER, Special Agent Federal Bureau of Investigation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a federal prisoner denied due process when his approval for placement in a Community Correction Center or halfway house is arbitrarily revoked or rescinded because of the extra-judicial actions of a federal judge and a federal prosecutor in objecting to his placement so that the Bureau of Prisons officials not only revoke or rescind his placement but also deny him his administrative remedies and access to the courts.

Are a federal judge and federal prosecutor absolutely immune for violating the constitutional rights of a federal prisoner by extra-judicially contacting Bureau of Prisons officials in an effort to have the prisoner's approval for placement in a Community Correction Center revoked or rescinded, and are prison officials immune for violating a prisoners due process rights by denying him access to the courts.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following are parties: John Hurley, Warden of the Federal Corrections Institution at Fort Dix; Ricky McIntosh, Unit Manager at Federal Corrections Institution at Fort Dix; William Langehenning, Acting Unit Manager and Senior Case Manager at Federal Corrections Institution at Fort Dix; Frank Gallagher, Special Agent of the Federal Bureau of Investigation.

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Petitioner Michael Lloyd respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

There is no opinion of the United States Court of Appeals for the Third Circuit. The Order of the Court of Appeals affirming the order of the district court on the merits is attached as Appendix A. The opinion of the district court in *Lloyd v. Levine*, Civ. No. 96-3496, is not published and is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 8, 1997. (Appendix A)

The jurisdiction of this Court is invoked under 18 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Article I, § 10 of the United States Constitution provides that:

> [n]o state shall . . . pass any . . . ex post facto law.

STATEMENT OF THE CASE

The fundamental question in this case is whether a federal prisoner has a liberty interest in his placement in a Community Correction Center (CCC) or halfway house so that it is a violation of his constitutional right to due process for that placement to be arbitrarily revoked or rescinded because of the unsolicited extra-judicial actions of a federal judge and federal prosecutor in contacting the officials at the prison to express their objections to his placement in a CCC. Because of this unsolicited extra-judicial contact, the prison officials revoked or rescinded the prisoner's placement in the CCC and denied him his administrative remedies. Jurisdiction in the United States Court of Appeals for the Third Circuit was based on *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), 28 U.S.C. § 2241, 28 U.S.C. § 1331 and 5 U.S.C. § 701, *et seq.*

A. Mr. Lloyd's Placement in CCC

Michael Lloyd entered a plea of guilty to charges relating to securities fraud on August 4, 1992. He was sentenced to a term of incarceration of seven years by the Honorable Harvey Bartle III. Mr. Lloyd appealed his sentence and the United States Court of Appeals for the Third Circuit vacated the sentence in part because it did not comply with the United States Sentencing Guidelines, and remanded it to Judge Bartle for re-sentencing. Judge Bartle expressed displeasure with the mandate of the Court of Appeals but sentenced Mr. Lloyd to a term of incarceration of 63 months.

Mr. Lloyd surrendered himself in September, 1992 and began to serve his sentence at the Allenwood Federal Prison Camp in Pennsylvania. In December, he was transferred to the Federal Corrections Institution at Fort Dix, New Jersey. On several occasions, Mr. Lloyd was granted and successfully

completed multi-day furloughs. He had twice been approved for CCC placement for the last 180 days of his sentence, the maximum permitted, but was denied admittance because of the lack of bed space.

On March 26, 1996, Mr. Lloyd received another recommendation from the Unit Team (consisting of Unit Manager, Case Manager and Inmate Counselor) for placement into a CCC for the last 180 days of his term. In April, 1996, Mr. Lloyd applied for a furlough privilege. One reason for this request was that Mr. Lloyd wanted to use the furlough to develop information to support his section 2255 motion. The furlough was approved and he was informed on May 17, 1996, that he could go on furlough any time after May 31, 1996. Mr. Lloyd chose June 1, 2, 3 and 4.

B. The § 2255 Motion

On October 13, 1993, an Order was entered by the Honorable Curtis Joyner in a civil action filed by the Securities and Exchange Commission. The Order provided, *inter alia*, that:

> the criminal information against Lloyd which was based on the same course of conduct which formed the basis for this action, and Lloyd's subsequent guilty plea.

Mr. Lloyd did not receive a copy of this order until August 14, 1995, when the Burlington County Sheriff served it upon him. Because this implicated Mr. Lloyd's constitutional right against double jeopardy arising from previous seizure actions taken against Mr. Lloyd by the Securities and Exchange Commission, Mr. Lloyd filed a motion to vacate his conviction under 28 U.S.C. § 2255. This motion was filed on May 3, 1996 and was assigned to Judge Bartle.

Judge Bartle learned through this motion that Mr. Lloyd had been approved for six months CCC placement. On June 11, 1996, Judge Bartle telephoned Warden John Hurley regarding the propriety of such placement for Mr. Lloyd. He telephoned Warden Hurley again on June 13, 1996, this time to inquire as to the number, duration and location of furloughs that had been granted to Mr. Lloyd. After receiving these telephone calls from Judge Bartle, Warden Hurley wrote to Judge Bartle informing him that Mr. Lloyd had met with the Unit Team with regard to placement in a CCC. Warden Hurley then indicated that because of his conversation with Judge Bartle, he asked for Judge Bartle's views and comments concerning Mr. Lloyd's placement in a CCC. By this time, however, as indicated by the prison records, Mr. Lloyd had already had a Unit Team recommendation for CCC placement. Warden Hurley later wrote to Judge Bartle with the information about Mr. Lloyd's furloughs. Judge Bartle responded to Warden Hurley, stating that Mr. Lloyd "deserves to be imprisoned for his full sentence" minus good time, that Mr. Lloyd "does not need to be placed in a Community Corrections Center in order to ease his return to civilian life", and that Mr. Lloyd does not even need furloughs in order to reestablish or to strengthen family ties. Judge Bartle also stated:

> I cannot imagine that it was the intent of Congress to allow a person such as Mr. Lloyd to have the benefit of several furloughs in light of the serious crimes he has committed. As a result of the 1984 sentencing reforms, Congress opted for fixed and determinate sentences. However, it appears that the old parole system is still with us.

In the meantime, Mr. Lloyd became aware that the attorney representing one of his adversaries in a civil action had received documents filed by Assistant United States Attorney Ronald Levine in Bankruptcy Court in Mr. Lloyd's bankruptcy case.

These documents had not been mailed to Fort Dix, where Mr. Lloyd was incarcerated, but to an address where he no longer resided.

When Mr. Levine became aware of Mr. Lloyd's § 2255 motion, he filed a letter request seeking an additional 100 days to respond to it. This letter was misdirected to Mr. Lloyd. Mr. Levine indicated that he would have stated that it was the position of the U.S. Attorney's Office that Mr. Lloyd's release to CCC would be inappropriate because of his huge outstanding restitution obligation.

On numerous occasions, prison officials opened Mr. Lloyd's "special mail" from the courts and read it outside his presence, and they frequently refused to accept mail for Mr. Lloyd.

C. The Denial of Furloughs and CCC Placement

On or about May 29, 1996, Mr. Lloyd was informed by the Unit Team that his previously approved furlough was being rescinded. Mr. Lloyd, under the Administrative Remedies Procedure Act, filed an Informal Resolution Form (BP-8), in which he voiced his complaint about having his previously approved furlough rescinded. On June 6, 1996, Mr. Lloyd filed directly through the Unit Team a Request for Administrative Remedy (BP-13). Mr. Lloyd has never received a response from prison officials.

On June 25, 1996, Mr. Lloyd met with his Unit Team, which again continued to recommend CCC placement. This was two weeks *after* Judge Bartle's comments to prison officials. On June 29, 1996, three days after Judge Bartle had written his letter to Warden Hurley objecting to Mr. Lloyd's CCC placement, Mr. Lloyd was informed that the recommendation for CCC placement was being reduced from 180 days to 120 days. At the

same time, Mr. Lloyd was informed that "at the request of outside law enforcement agencies", the Unit Team had reevaluated his CCC recommendation. But the Unit Team, having noted that he had a release residence already secured and solid employment possibilities, continued to recommend 120 days CCC placement.

On July 1, 1996, Mr. Lloyd was informed that the now reduced 120 days of CCC placement was being totally rescinded. The reason for the rescission was the "substantial objection from the sentencing court". Mr. Lloyd filed an Informal Resolution Form outlining his complaint of the rescission of his CCC placement. On July 2, 1996, he filed a Request for Administrative Remedy Form directly through the Unit Team. Mr. Lloyd has never received any response from the appropriate prison officials.

D. The Proceedings Below

On July 9, 1996, Mr. Lloyd filed a motion seeking an Order of Recusal of Judge Bartle on the § 2255 application, basing his request on the *ultra vires* acts of Judge Bartle, which included in part the rescission of the CCC placement. On August 24, 1996, by random re-assignment, Judge Bartle was removed from Mr. Lloyd's § 2255 application by the Chief Judge of the District. The record does not reflect that Judge Bartle recused himself despite his statement that he did so.

Having received no response after the required 20 days, Mr. Lloyd filed suit in United States District Court for the District of New Jersey, including as part of the filing an ex parte Order to Show Cause with Temporary Restraints. The District Court denied the issuance of a temporary restraining order.

The defendants filed a motion for summary judgment. On November 4, 1996, the Honorable Jerome B. Simandle, U.S.D.J., entered an Order denying Mr. Lloyd's motion and granting the

defendants' motion, dismissing his complaint against Judge Bartle, Mr. Levine and the other defendants. In his opinion, Judge Simandle held that there was no personal jurisdiction over Judge Bartle, Prosecutor Levine or Special Agent Gallagher, that Judge Bartle was absolutely immune because his statements constituted a "judicial act" in that he was merely offering a sentencing-related opinion on a defendant he had originally sentenced, that Mr. Levine was also absolutely immune in that his recommendation was official conduct intimately associated with the judicial phase of the criminal process, and that Special Agent Gallagher was entitled to qualified immunity but that he was immune. With regard to the decision to revoke CCC placement to Mr. Lloyd, Judge Simandle held that the decision was not reviewable absent violation of a constitutional right, and that there was no violation of a constitutional right.

On appeal to the Third Circuit Court of Appeals, Mr. Lloyd argued that there was personal jurisdiction, that there was no judicial or prosecutorial immunity, and that the grant of summary judgment regarding the decision to rescind the CCC placement was an error in that the decision constituted a violation of due process. Mr. Lloyd argued that he had a liberty interest protectible under the United States Constitution in CCC placement since he had qualified for and been granted CCC placement. Mr. Lloyd also argued that the rescission of his CCC placement constituted a violation of the Ex Post Facto Clause of the Constitution.

On August 8, 1997, the Court of Appeals affirmed, without opinion, the Order of the District Court "on the merits and not on the grounds of lack of personal jurisdiction." By doing so, the Court of Appeals has ruled that the rescission of a federal prisoner's CCC placement because of the extra-judicial comments by the sentencing judge and a federal prosecutor is not a denial of the prisoner's due process rights. This is in direct

contradiction of the Court of Appeals' own ruling in *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980), in which it was held that a prisoner had stated a cause of action for deprivation of his procedural due process rights when, because of fear of adverse public reaction and legislative reprisals against the prison system, prison officials denied an application for work release to a prisoner who had been sentenced to life imprisonment for the felony murder of a Delaware State Police Officer.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE RULING BY THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S RULINGS ON THE DUE PROCESS RIGHTS OF PRISONERS AND CONFLICTS WITH THE RULINGS OF OTHER COURTS OF APPEALS.

Mr. Lloyd's petition for writ of certiorari should be granted because the ruling below conflicts with this Court's rulings on a prisoner's fundamental due process rights, as well as with the rulings of other Courts of Appeals that have considered the question.

Mr. Lloyd's claim consists of both procedural and substantive due process violations. The use of impermissible extra-judicial criteria to rescind the CCC placement denied Mr. Lloyd the process of review of the program and thus violated procedural due process. The use of impermissible extra-judicial criteria also deprived Mr. Lloyd, as contrasted with other prisoners, of access to the CCC placement program. The threshold question is whether there is any protectible

constitutional interest implicated in the program of CCC placement.

It is clear that while a prisoner's constitutional rights are circumscribed, *Price v. Johnston*, 334 U.S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948), "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935 (1974). For instance, in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), this Court held that the due process clause protects prisoners from arbitrary or capricious deprivation of those facets of a convicted criminal's existence that qualify as liberty interests. In *Morrissey*, such a liberty interest was found in parole revocation proceedings.

This Court has not found a constitutionally-protected liberty interest in CCC placement, but in *Wolff*, 418 U.S. at 557, 94 S. Ct. at 2975, this Court held that under the state's system of "good-time credits", which could only be forfeited for serious misconduct, the state had created a right to good-time credits that could only be removed if a prisoner engaged in serious misconduct. Consequently, the prisoner had an interest of real substance sufficiently embraced within the Constitution to entitle him to the minimum procedures required by the Due Process Clause.

In the case at bar, the Bureau of Prisons, pursuant to 28 U.S.C. § 3624(c), put in place a system whereby federal prisoners can qualify for placement in a Community Corrections Center for a maximum of 180 days. Therefore, once a prisoner has become eligible for and has been recommended for placement in a CCC, he has acquired an interest of real substance that entitles him to the constitutional protection of the Due Process Clause.

In *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980), a prisoner in the Delaware state prison system requested classification to work release status after 10 years in prison, during which he had been a model prisoner, had taken courses in heating and air conditioning, wrote for the prison newspaper and got along well with inmates and officers. He was serving a life sentence for felony murder of a Delaware State Police Officer. The Delaware work release program was governed by statute and regulations and required three levels of decision making. The prisoner's application was approved by all three levels on its way to the Superintendent for his final approval. However, public opposition to granting work release for Winsett was becoming manifest. A Delaware state senator wrote a letter to the superintendent, strongly condemning what the senator believed to be the superintendent's intention to prepare Winsett for work release. The superintendent replied to the state senator by indicating that as long as he was superintendent, he would never be able to entertain any requests from Winsett for work release. The superintendent rejected Winsett's application for work release and Winsett initiated an action alleging that the rejection was predicated on the "sensitivity" of his offense and that this was a legally impermissible basis for evaluating work release applications. While the action was pending, Winsett applied a second and third time for work release. His second application was approved by two levels before being denied. His third application was approved by all three committees before being vetoed.

Winsett argued that by establishing a work release program, the state had created a protectible interest in participation in the program by eligible inmates and that the use of impermissible criteria to deny him access to the program denied him his right to liberty guaranteed by the Fourteenth Amendment. As in the case at bar, the due process claim had both procedural and substantive overtones. The court found that there was no

constitutionally mandated right to enter a discretionary parole release program, but cited *Wolff* in noting that the United States Supreme Court has been willing to extend Fourteenth Amendment protection when a state has created a liberty interest in the form of a specific guarantee. Noting that the fundament of Winsett's claim is the regulations promulgated by the Delaware Department of Corrections to implement the legislative grant of authority to create a work release program and that it is this set of regulations that Winsett claims creates the liberty interest entitled to constitutional protection, the court first held that the state-created right can be established in the regulations implementing the statute. The court cited *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121, 99 S. Ct. 1033, 59 L. Ed. 2d 82 (1979), for then holding that if a prisoner could establish that as a matter of practice his work release program would not be revoked absent a rule violation, he had an interest protected by due process. The court held that under *Durso*, the Due Process Clause may be triggered by official policies and practices. The court stated:

> The presence of discretion on the part of the prison authorities in the work release program does not negate the possibility that a state-created entitlement to work release may exist, because we do not view the prison authorities' discretion as absolute. If the prison authorities could by the arbitrary exercise of discretion deny a work release application to a prisoner even though he met all eligibility requirements, then any entitlement to work release would be illusory rather than real.

617 F.2d at 1006. The court indicated that it could not believe that the committees, whose function involved making rather detailed evaluations of inmates' fitness for work release, were intended to be overriden for any reason chosen by the

superintendent, however unrelated to the statutory purpose. The court held that a state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is consistent with work release policy. The court concluded that Winsett had a protectible liberty interest in work release because he met all eligibility criteria, and that the considerations influencing the discretionary denial of work release, namely the concern for public opinion and fear of legislative reprisals, were outside the legitimate bounds of the prison officials' discretionary power. The court stated that had the officials acted within the permissible scope of their discretion, Winsett would have been granted work release. The court indicated that to hold otherwise would mean that the state-created interest in work release for eligible prisoners could be overriden simply by the prison officials' abuse of discretion. The court concluded that Winsett had a liberty interest protectible under the Fourteenth Amendment's guarantee of due process.

Having come to that conclusion, the court next considered whether the denial violated Winsett's procedural due process rights. The court stated:

> If the prison officials considered the extraneous criteria of public opinion and legislative reaction, the normal procedure for considering work release applications was distorted to Winsett's detriment. Under the work release program, the applicant is entitled to have his application approved if all eligibility criteria are met and the prison authorities approve the application. If the authorities do not properly exercise their discretion, the process due under the work release program is denied.

617 F.2d at 1008. The court concluded that in considering the

extraneous criteria, the officials violated the procedure to be accorded Winsett's work release application, and that Winsett has a cause of action against them for the alleged deprivation of procedural due process. The court noted that society recognizes that there is a terminal point to retribution and that it should concern itself with the rehabilitation and return of the prisoner to a productive role in the community. Although acknowledging a degree of imprecision in determining eligibility, the court stated:

> When the discrepant treatment between prisoners is purposeful and participation in work release is denied to one prisoner only because of the Superintendent's amorphous perception of public opinion, then the laudable purposes of a structured program are skewed by a basic lack of fairness. If work release for a prisoner is not determined solely on the basis of the statutory and regulatory criteria established by the state but may also depend upon what may be perceived public reaction to it, these extraneous considerations can cut both ways. Not only can worthy work release applications be thereby denied but similar influences may compel admittance to the program of undesirable and unqualified applicants.

617 F.2d at 1008, n.14.

Like the state system in *Winsett*, the federal system has in place a program for placement in a Community Correction Center for federal prisoners. Once a prisoner has met all eligibility criteria, he can be recommended for placement in a CCC. Like Winsett, Mr. Lloyd met all the eligibility criteria in the system for placement in the program. Like Winsett, Mr. Lloyd was approved for placement in the program several times and was awaiting only the last 180 days of his incarceration. Like

Winsett, Mr. Lloyd was denied placement in the program because of impermissible extraneous fears due to the objections of the sentencing judge and a federal prosecutor. Like the prison officials in *Winsett*, the prison officials at Fort Dix did not properly exercise their discretion and the normal procedure for considering Mr. Lloyd's application for placement in a CCC was distorted to his detriment. As in *Winsett*, the process due under the program was denied, violating Mr. Lloyd's constitutional right to procedural due process.

In the recent case of *Sandin v. Conner*, __ U.S. __, 115 S. Ct. 2293, 2299-2300, 132 L. Ed. 2d 418 (1995), this Court narrowed the range of circumstances that will give rise to a state-created liberty interest for prisoners, holding that such interests "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995), the Court of Appeals, interpreting *Sandin*, held that participation in a pre-release conditional supervision program similar but more restrictive than parole was a protectible liberty interest. The prisoner was terminated from the program. He received verbal notice of the termination less than five hours before he had to turn himself in to authorities. He never had any hearing at which he could present evidence of any kind. The court held that program participation is sufficiently similar to parole or probation to merit protection under the Due Process Clause, and that because the prisoner was qualified to remain with the program, he was entitled to receive due process before being deprived of his liberty. The court stated:

> The passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind* of confinement, a transformation that signals the existence of an inherent

> liberty interest and necessitates the full panoply of procedural protections outlined in *Morrissey*.

64 F.3d at 566.

In *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997), the court applied *Sandin* to a prisoner's claim of a violation of procedural due process in his transfer to administrative custody for fifteen months because he was suspected of beating and raping a female prison guard. The prison regulations provided that confinement in administrative custody shall not exceed 10 days, with an additional 10 day investigative confinement period if the investigation is not completed. Although the court found that the commitment to and confinement in administrative custody did not deprive the prisoner of a liberty interest and that he was not entitled to procedural due process protection, the court nevertheless acknowledged that

> the regulations confer upon an inmate in Griffin's position a right to be released from administrative custody after 20 days in the absence of a misconduct charge.

The thread running through all this is that prison regulations can create a right that can be protected by the Due Process Clause of the Constitution. In *Griffin*, the regulations created a protectible right not to spend more than 20 days in administrative custody. In *Harper*, the regulations created a protectible right to remain in a pre-release supervision program. In *Winsett*, the regulations created a protectible right to be admitted to a work release program.

The case at bar is almost exactly like *Winsett* in that Mr. Lloyd has met all eligibility criteria for acceptance into a program, has been approved at all levels not only once but several

times for acceptance into a program, and has been denied acceptance into the program because of the improper exercise of discretion on the part of prison officials due to objection to the admittance of the prisoner to the program by influential persons outside the prison system, despite the fact that the persons most intimately involved with the program consistently approved Mr. Lloyd's admittance into the program. The rescission of Mr. Lloyd's admittance into a CCC was not accomplished with due process. It was done by the improper exercise of discretion by the prison officials acting under impermissible outside pressure. Consequently, Mr. Lloyd was denied the process due him under the United States Constitution, and his petition should be granted so that this Court may affirm its holdings on due process for protectible rights of prisoners

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE ALTERATION OF THE PROVISIONS OF THE CCC PLACEMENT PROGRAM VIOLATES THE EX POST FACTO PROVISION OF THE UNITED STATES CONSTITUTION.

In this Court's recent decision in *Lynce v. Mathis*, __ U.S. __, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), a 1992 Florida statute cancelling provisional release credits or overcrowding credits was held to be violative of the Ex Post Facto Clause of the United States Constitution. Article I, § 10 of the Constitution provides that "[n]o state shall . . . pass any . . . ex post facto law." In *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), Justice Stone explained:

> The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent

> acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court recognized that retroactive alteration of parole or early release provisions implicates the Ex Post Facto Clause because such they are determinant of the prisoner's term of incarceration so that the prisoner's effective sentence is altered once this determinant is changed. This Court explained that the removal of such provisions can constitute an increase in punishment because a

> prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

450 U.S. at 32.

Placement in a CCC is also a determinant of a prisoner's term of incarceration. Any alteration or change in the system governing placement in a CCC also alters or changes the prisoner's effective sentence and constitutes an increase in punishment. In the case at bar, the "alteration" of the system because of the improper exercise of discretion by the prison officials influenced by the impermissible extraneous objections of a federal judge and prosecutor makes an even more compelling case for a violation of the Ex Post Facto Clause. Consequently, the petition should be granted in order that this Court may affirm the importance of its holdings on the Ex Post Facto Clause with respect to the increase in punishment imposed on prisoners.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE RULINGS REGARDING IMMUNITY FOR JUDGE BARTLE AND PROSECUTOR LEVINE CONFLICT WITH THIS COURT'S PRIOR RULINGS.

It is well-settled that federal judges are absolutely immune from suit for acts committed while within the scope of their judicial duties, although not in their administrative duties. *Forrester v. White*, 484 U.S. 219 (1988); *Pierson v. Ray*, 386 U.S. 547 (1967). In *Pulliam v. Allen*, 466 U.S. 522 (1984), this Court held that judicial immunity does not extend to protecting a judge when the judge's actions have violated the constitutional rights of the plaintiff. It is clear that the acts of Judge Bartle in taking it upon himself to contact the prison warden solely in order to voice his biased objection to the placement of Mr. Lloyd in a CCC for the last 180 days of his incarceration term violated Mr. Lloyd's constitutional rights. They were clearly extra-judicial and not within the scope of his judicial duties. The fact that his initiating contact with the warden was the result of his private animus and bias against Mr. Lloyd is clear from his written comment that he could not imagine that Congress intended to allow "*a person such as Mr. Lloyd*" to have the benefit of several furloughs. Clearly, if Judge Bartle wanted to prevent Mr. Lloyd from furloughs and from CCC placement for the last few months of his term, he had two opportunities to do so — the first sentencing and the second sentencing. Had he done so at either time, he would have been clothed with judicial immunity.

Judge Bartle was not aware of the recommendation that Mr. Lloyd be placed in CCC for his last 180 days until he received Mr. Lloyd's § 2255 motion to vacate his conviction and sentence. As soon as that motion was received and Judge Bartle became

aware of the CCC placement recommendation, he telephoned the warden and objected. The filing of the § 2255 motion did not require the judge to telephone the warden of the prison in which the person filing the motion is incarcerated. The sole purpose for Judge Bartle's telephone call to the warden was to forcefully present his objections to the placement of Mr. Lloyd into a CCC in an attempt (and a successful one at that) to pressure the warden into rescinding Mr. Lloyd's placement in a CCC.

Prison officials did not contact Judge Bartle or solicit his comments during the process of evaluating Mr. Lloyd for CCC placement before the filing of the § 2255 motion. Mr. Lloyd was recommended for CCC placement several times without input from Judge Bartle. It was Judge Bartle who initiated contact with the warden, who did not write to Judge Bartle asking for his comments until after he had been contacted twice by Judge Bartle. Judge Bartle's comments were not necessary or required for the evaluation of Mr. Lloyd for placement into a CCC. Clearly, the unsolicited negative opinion of Judge Bartle did not further or involve his judicial duties.

With respect to Ronald Levine, Assistant United States Attorney, this Court has held that a federal prosecutor was absolutely immune from suit for malicious prosecution. *Yaselli v. Goff*, 275 U.S. 503 (1927). This holding was re-affirmed by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), where it was held that the immunity extends to any activities of the prosecutor which are intimately associated with the judicial phase of the criminal process. However, absolute immunity does not extend to actions taken by a prosecutor in his role as an advocate for the state or in actions taken in an administrative or investigative capacity. *Burns v. Reed*, 500 U.S. 478, 491 (1991).

It is clear that Mr. Levine's acts were not intimately associated with the judicial phase of the criminal process in Mr.

Lloyd's case. Mr. Lloyd had almost completed his sentence and was in the process of going home. All of Mr. Levine's actions related to his attempts to collect restitution money from Mr. Lloyd, including writing to the United States Bankruptcy Court and the Superior Court of New Jersey to place liens on property owned by Mr. Lloyd. In objecting to Mr. Lloyd's placement in a CCC, Mr. Levine specifically linked his opposition to the fact that release to community confinement would be inappropriate because of Mr. Lloyd's outstanding restitution obligation. This clearly is not an intimate association with the judicial phase. At best, it is an administrative action or an action taken in his role as an advocate for the government in attempting to reclaim restitution money.

With respect to the prison officials, it is clear that they violated Mr. Lloyd's rights by opening his "special mail" from courts, from the prosecutor's office and from court clerks and reading it outside his presence. *See Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995); *Procunier v. Navarette*, 434 U.S. 555 (1978). They also refused to accept such mail for Mr. Lloyd. In addition, Judge Bartle and Mr. Levine deliberately misdirected Mr. Lloyd's mail so it would not reach him in a timely manner, thereby unconstitutionally denying him timely access to the courts.

The petition should be granted so that this Court may affirm its important holdings on the immunity granted to federal judges and prosecutors and so that it may establish that immunity is not to be extended to extra-judicial acts, and also confirm that prison officials are not immune for violating a prisoners due process rights to access to the courts.

CONCLUSION

This case presents questions of importance for this Court, namely, whether a federal prisoner is denied due process when his placement in a Community Correction Center is denied because of extra-judicial actions of a federal judge and a federal prosecutor in pressuring prison officials to improperly exercise their discretion, whether the rescission of approval for placement in a CCC violates the Ex Post Facto Clause, whether the federal judge and federal prosecutor are absolutely immune for the acts done outside the scope of their judicial duties, and whether prison officials are immune for violating a prisoners due process rights to access to the courts.

Accordingly, Michael Lloyd respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

JULIE A. MARZANO

Counsel of Record
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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 8, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5739

MICHAEL LLOYD,

APPELLANT

v.

RONALD LEVINE, Assistant United States Attorney
HARVEY BARTLE, III, Judge, United States District Judge;
JOHN HURLEY, Warden, FCI - Fort Dix;
RICKY MCINTOSH, Unit Manager, FCI - Fort Dix;
WILLIAM LANGEHENNING, Acting Unit Manager,
Senior Case Manager, FCI - Fort DIX;
FRANK GALLAGHER, Special Agent Federal Bureau
of Investigation

Appeal from the United States District Court
for the District of New Jersey
D.C. Civ. No. 95-cv-03496
(District Judge: Honorable Jerome B. Simandle)

Argued: July 21, 1997

Before: BECKER, MANSMANN, and ROSENN,
Circuit Judges.

Appendix A

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court of November 7, 1996 be and is hereby AFFIRMED.[1]

Costs taxed against appellant.

BY THE COURT:
s/ illegible
Circuit Judge

Attest:
s/ Bradford A. Baldus
Bradford A. Baldus
Chief Deputy Clerk

AUG - 8 1997

Costs taxed in favor of Appellees as follows:
Total Costs $257.60

Certified a true copy and issued in lieu of a formal mandate on September 29, 1997.

Teste: s/ P. Douglas Sisk
Clerk, United States Court of Appeals for the Third Circuit

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1. We affirm on the merits and not on the grounds of lack of personal jurisdiction.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CAMDEN VICINAGE ENTERED NOVEMBER 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JEROME B. SIMANDLE

Civil No. 96-3496

MICHAEL LLOYD,

Plaintiff,

v.

RONALD LEVINE, Assistant United States Attorney, et al.,

Defendants.

ORDER

THIS MATTER having been brought upon motion before the Court by Mary R. Machulsky, Esquire, attorney for plaintiff, for an order granting expedited discovery; and the Court having considered the moving papers; and there being no opposition to this motion; and for good cause shown herein;

IT APPEARING TO THE COURT that on November 4, 1996, the Honorable Jerome B. Simandle entered an order dismissing plaintiff's Complaint as to all defendants, and, therefore, this Court is without jurisdiction to decide the instant motion;

Appendix B

IT IS this 18 day of November, 1996 hereby

ORDERED that the plaintiff's motion is **DISMISSED.**

s/ Robert B. Kugler
ROBERT B. KUGLER
United States Magistrate Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 4, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 96-3496 (JBS)

MICHAEL LLOYD,

Plaintiff,

v.

RONALD LEVINE, Assistant United States Attorney, HARVEY BARTLE, III, United States District Judge, JOHN HURLEY, Warden, RICKY MCINTOSH, Unit Manager, WILLIAM LANGEHENNIG, Acting Unit Manager, FRANK GALLAGHER, Federal Bureau of Investigation Special Agent,

Defendants.

ORDER

This matter having come before the Court upon the motion of plaintiff for a preliminary injunction, as well as upon the motion of defendants for summary judgment; and the Court having considered the submissions of the parties; and the Court having heard oral argument on October 21, 1996; and for the reasons stated in the Opinion of today's date;

IT IS this 4th day of November 1996, hereby

ORDERED that plaintiff's motion for a preliminary injunction is hereby **DENIED**; and it is

Appendix C

FURTHER ORDERED that the Complaint against defendants Ronald Levine and Frank Gallagher is **DISMISSED** for lack of personal jurisdiction; and it is

FURTHER ORDERED that defendants Harvey Bartle, III, and Ronald Levine are entitled to absolute immunity from this suit and the claims against them are **DISMISSED** with prejudice; and is

FURTHER ORDERED that all defendants' motions for summary judgment are hereby **GRANTED**.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 96-3496 (JBS)

MICHAEL LLOYD,

Plaintiff,

v.

RONALD LEVINE, Assistant United States Attorney, HARVEY BARTLE, III, United States District Judge, JOHN HURLEY, Warden, RICKY MCINTOSH, Unit Manager, WILLIAM LANGEHENNIG, Acting Unit Manager, FRANK GALLAGHER, Federal Bureau of Investigation Special Agent,

Defendants.

APPEARANCES:

Mary R. Machulsky, Esquire
525 Main Street
Sewell, N.J. 08080
Attorney for Plaintiff

James B. Clark, III
Assistant United States Attorney
Office of the United States Attorney
402 East State Street, Room 502
Trenton, N.J. 08608
Attorneys for Defendants

SIMANDLE, District Judge:

Appendix C

Plaintiff, Michael Lloyd, who is currently incarcerated, seeks an order compelling the Federal Bureau of Prisons ("BOP") to grant him placement at a Community Confinement Center ("CCC") for the final six months of his prison term. He also brings *Bivens* claims against various government officials who allegedly deprived plaintiff of his alleged right to CCC placement. The defendants in this case are Ronald Levine, Assistant United States Attorney for the Eastern District of Pennsylvania; the Honorable Harvey Bartle, III, United States District Judge for the Eastern District of Pennsylvania; John Hurley, Warden, FCI - Fort Dix; Ricky McIntosh, Unit Manager, FCI - Fort Dix; William Langehennig, Acting Unit Manager, FCI - Fort Dix; and Special Agent Frank Gallagher of the F.B.I. Presently before the Court are: 1) plaintiff's application for a preliminary injunction compelling CCC placement; and 2) defendants' cross-motion for summary judgment.

These motions present interesting issues of whether a federal inmate has a right to placement in a community confinement center if he meets the eligibility criteria of 18 U.S.C. § 3624(c)[1], whether a decision denying early release to community confinement is barred from judicial review under 18 U.S.C. § 3625[2], whether judicial and law enforcement

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1. 18 U.S.C. § 3624(c) provides, in part: "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community."

2. 18 U.S.C. § 3625 states: "The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter."

officials who allegedly participate in a Bureau of Prisons decision to deny early release are immune from suit, and whether the evidence in this case can support plaintiff's claim that he was denied early placement in retaliation for filing a petition attacking his conviction in federal court.

This Court denied plaintiff's *ex parte* request for a temporary injunction by Memorandum Order filed August 16, 1996. The preliminary injunction hearing was scheduled for October 21, 1996, as plaintiff's counsel did not promptly serve some of the defendants with the Complaint and its exhibits, together with this Court's Memorandum Order, as required by that Order, until about September 11, 1996. In any event, the defendants were able to submit their opposition to plaintiff's preliminary injunction motion on September 30, 1996, together with their notice of cross-motion accompanied by Declarations of Judge Bartle, A.U.S.A. Levine, Special Agent Gallagher, Alberto Munguia, Warden John Hurley, William Langehennig, and Ricky McIntosh. Plaintiff filed a rebuttal certification on October 11, 1996, with attached exhibits A through HH. Similarly, plaintiff's counsel, Mary Machulsky, filed her rebuttal certification on October 11, 1996. Also before the Court is the certification of A.U.S.A. James Clarke, dated October 15, 1996. Lastly, at the Court's request at the preliminary injunction hearing, in order to afford plaintiff the possible benefit of information from his own file and to ensure that the record is complete in this case[3], a supplemental Declaration dated October

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3. In addition to supplying numerous documents in the record at the hearing on October 21, 1996, plaintiff's counsel argued that she needed to inspect her client's central prison file to seek documents of additional contacts by defendants with prison authorities concerning consideration of plaintiff's CCC placement. This Court granted plaintiff's request and compelled the BOP's inspection and immediate disclosure of any further

(Cont'd)

23, 1996, has been submitted by Mr. Munguia, a supplemental Declaration dated October 22, 1996, has been submitted by Mr. Langehennig, and a supplemental Declaration dated October 25, 1996, has been submitted by Ms. Machulsky. All of these documents, together with the arguments of counsel on October 21, 1996, constitute the record in this case.

The following represent the Court's findings pursuant to Rule 52(a), Fed. R. Civ. P., with respect to plaintiff's motion for a preliminary injunction, and pursuant to Rule 56, Fed. R. Civ. P., with respect to defendants' motion for summary judgment.

Background

Lloyd is currently in prison, confined at the Federal Correction Institution at Fort Dix, N.J., for having violated federal securities laws. On August 4, 1992, Mr. Lloyd was sentenced to a term of seven years imprisonment, subsequently reduced to 63 months, plus three years of supervised release and an order for restitution to the victims of his multi-million dollar crimes, in the amount of $4.6 million. The S.E.C. has also obtained a civil judgment against Lloyd. Lloyd's term of incarceration is scheduled to end in March 1997, assuming his

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(Cont'd)
relevant communications regarding this issue in plaintiff's central file. The inspection took place on October 22, 1996, and was unproductive of any new information. The Court had granted this expedited discovery in response to plaintiff's counsel's request for same, premised upon her belief, conveyed by plaintiff to her, that he had seen additional documents in his prison file. In any event, no other discovery was portrayed by plaintiff as necessary for plaintiff's ability to oppose the defendants' cross-motion for summary judgment, and no affidavit to that effect was filed under Rule 56(f), Fed. R. Civ. P., and the summary judgment motion is thus ripe for adjudication.

continued eligibility for good-time credits. On or about May 22, 1996, plaintiff filed a petition for relief from his conviction under 18 U.S.C. § 2255 in the Eastern District of Pennsylvania, Civil Action 96-3876, which was assigned to Judge Bartle. The § 2255 petition raises grounds of double jeopardy arising from previous forfeiture actions taken against Lloyd by the S.E.C. (After plaintiff filed this suit against Judge Bartle, the Judge recused himself and the § 2255 petition was reassigned to Judge Norma Shapiro by Order of Chief Judge Edward Cahn, prior to September 5, 1996, when Judge Shapiro wrote to Mr. Lloyd and A.U.S.A. Levine. As discussed below, there is no reason to believe the Bureau of Prisons officials named in this case were even aware of plaintiff's § 2255 petition before they decided that Lloyd would not receive CCC placement in early July 1996.)

In March 1996, a team of prison officials recommended that Lloyd be placed in a Community Confinement Center for the final 180 days of his sentence. By June 14, the unit team was considering 90-120 days early placement to a CCC, and Warden Hurley invited Judge Bartle's views and comments on CCC placement of Lloyd. (*See* Hurley Letter of June 14, 1996). Judge Bartle, who was the sentencing judge in plaintiff's criminal case, responded by letter of June 26, 1996, stating that in Judge Bartle's view, plaintiff "does not need to be placed in a Community Corrections Center in order to ease his return to civilian life . . . [nor] in order to 'reestablish' or to 'strengthen' family ties." (Bartle Letter of June 26, 1996). His letter noted that Lloyd had received three furloughs for these purposes, as Warden Hurley's letter of June 15, 1996, had stated. After receiving the letter from Judge Bartle that was strongly opposed to granting plaintiff any CCC time, the prison officials informed Lloyd that he was not eligible for CCC placement, as the unit team had reevaluated the case and amended its prior

recommendation, this time denying CCC placement due to the number of Lloyd's victims, the severity of offense, and the sentencing court's concerns. (*See* McIntosh Declaration at ¶ 7; Langehennig Declaration at ¶ 4). Warden Hurley, who is the approving official for all halfway house recommendations at Fort Dix (*see* Hurley Declaration at ¶ 4), concurred in the unit team's change of position.

Lloyd claims that the denial of CCC placement was carried out by Judge Bartle and various other government officials to retaliate against Lloyd for bringing a habeas petition and contesting certain actions of the S.E.C. relating to forfeiture of Lloyd's property. In an affidavit, Judge Bartle explains that such retribution was not his motive, and that he felt that: 1) Lloyd was not in need of CCC time in order to ease his transition back into society; and 2) Lloyd had committed serious crimes for which he should serve a full sentence in prison. For their part, defendant prison officials explain that Judge Bartle's opinion caused them to re-examine their earlier conclusions, and led them to believe that CCC placement would not be appropriate in this case. Moreover, each of the three BOP officials was unaware of plaintiff's § 2255 action or challenge, if any, to the S.E.C. judgment. (McIntosh Declaration at ¶ 3; Hurley Declaration at ¶ 3; Langehennig Declaration at ¶ 3). The two remaining defendants, Special Agent Gallagher and A.U.S.A. Levine, have no recollection of having any input in the CCC determination. While Gallagher specifically denies such contact (*see* Gallagher Declaration ¶¶ 6-7), A.U.S.A. Levine recalls no such contact but states that it is possible that he could have voiced the position of the U.S. Attorney's Office that Lloyd's release to community confinement would be inappropriate because of his huge outstanding unpaid restitution obligation. (Levine Declaration at ¶¶ 7-8).

Appendix C

Discussion

I. *Plaintiff's Motion for a Preliminary Injunction*

The granting of a preliminary injunction is an extraordinary remedy "which should be granted only in limited circumstances." *Frank's GMC Truck Center. Inc. v. G.M.C.*, 847 F.2d 100, 102 (3d Cir. 1988); *see Driscoll Potatoes. Inc. v. N.A. Produce Co., Inc.*, 765 F. Supp. 174, 176 (D.N.J. 1991). In order to prevail on a request for a preliminary injunction, the movant must demonstrate: (1) that the party will suffer irreparable injury if the relief is not granted; (2) that there exists a reasonable probability of success on the merits in the underlying litigation; (3) that other interested parties will not suffer substantial harm if the injunctive relief is granted; and (4) that the injunctive relief would serve the public interest. *See Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992); *Instant Air Freight Co. v. C.V. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989); *Apollo Technologies Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1191 (D.N.J. 1992).

Failure to demonstrate either of the first two requirements, a likelihood of success on the merits and irreparable injury, "must necessarily result in the denial of a preliminary injunction." *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982). Furthermore, "[a]ll four factors should favor preliminary relief before the injunction will issue." *S & R Corp.*, 968 F.2d at 374 (citing *Bill Blass, Ltd. v. Saz Corp.*, 751 F.2d 152, 154 (3d Cir. 1984)).

As noted, in this case, plaintiff has moved for a preliminary injunction compelling the Bureau of Prisons to grant plaintiff

CCC placement. That motion is denied because plaintiff has not demonstrated a likelihood of success on the merits in this litigation. In fact, the evidentiary items in the record persuade the Court that summary judgment in favor of the defendants is appropriate in this case. The reasons behind that conclusion are explained in the following section of this Opinion.

II. *Defendants' Motion for Summary Judgment*

A. Summary Judgment Standard

The standard for granting summary judgment is a stringent one. A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether there is a disputed issue of material fact the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080-81 (3d Cir. 1996); *Kowalski v. L & F Prods.*, 82 F.3d 1283, 1288 (3d Cir. 1996); *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. denied*, 465 U.S. 1091 (1984). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986).

Supreme Court decisions mandate that: "[w]hen the nonmoving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial." *Brewer v. Quaker State*

Oil Refining Corp., 72 F.3d 326, 329-330 (3d Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1987)). However, "the nonmoving party creates a genuine issue of material fact if it provides sufficient evidence to allow a reasonable jury to find for him at trial." *Brewer*, 72 F.3d at 330 (citing *Anderson*, 477 U.S. at 248). Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

B. The Merits of Defendants' Summary Judgment Motion

Defendants offer three reasons why summary judgment should be granted to defendants in this case. First, defendants assert that this Court does not have personal jurisdiction over plaintiff's claims against Judge Bartle, A.U.S.A. Levine, or Special Agent Gallagher. Defendants also contend that they are either qualifiedly or absolutely immune from plaintiff's suit. As to the merits of plaintiff's causes of action, defendants argue that they violated neither the Administrative Procedure Act, *see* 5 U.S.C. § 551 *et. seq.*, nor any constitutional provision in denying plaintiff's request for CCC placement. These contentions will be addressed in turn.

1. Personal Jurisdiction

Defendants contend that Judge Bartle, Prosecutor Levine, and Special Agent Gallagher all live and work outside of New Jersey and do not have the minimum contacts with New Jersey

that would enable this Court to exercise jurisdiction over those defendants.

A federal court may assert jurisdiction over a defendant to the extent authorized by the law of the state in which the federal court sits. *Carteret Savings Bank v. Shushan*, 954 F.2d 141, 145 (3d Cir.), *cert. denied*, 506 U.S. 817 (1992). Under New Jersey law, courts may assert jurisdiction over a person to the limits permitted by the Due Process Clause of the Constitution. *Id.* Thus, the jurisdiction question in this case is to be guided by traditional notions of fair play and substantial justice. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Plaintiff bears the burden of establishing by a preponderance of the evidence facts sufficient to establish personal jurisdiction. Through sworn affidavits or other competent evidence, plaintiff must establish with reasonable particularity the extent of defendants' contacts with the state of New Jersey. *See Patterson v. F.B.I.*, 893 F.2d 595, 603-04 (3d Cir.), *cert. denied*, 498 U.S. 812 (1990).

We will assume for purposes of these motions that plaintiff has successfully demonstrated that Judge Bartle's contacts with the state of New Jersey enable this Court to exercise personal jurisdiction over that defendant. In his Declaration, Judge Bartle acknowledges communicating with BOP officials in New Jersey about plaintiff's CCC placement, both on the telephone and through written correspondence. (Bartle Declaration at ¶ 5). Those same communications to the BOP officials, who were located in New Jersey at the time of the communications, form the basis of plaintiff's claims against Judge Bartle. Thus, because plaintiff's claims against Judge Bartle arise from Judge Bartle's New Jersey-related activities, it can be assumed that this Court has "specific jurisdiction" over plaintiff's case against that defendant. *See Reliance Steel Prods. Co. v. Watson, Ess,*

Marshall & Enggas, 675 F.2d 587, 588 (3d Cir. 1982). We do not reach the issue of Judge Bartle's amenability to personal jurisdiction in the District of New Jersey, however, because other defenses are dispositive of all claims against Judge Bartle.

Plaintiff has not established that defendants Levine and Gallagher had such minimum contacts with New Jersey. In their unrebutted affidavits, both of those defendants deny having any substantial, general contact with New Jersey, and neither recall having any contact with BOP officials regarding CCC placement for plaintiff. (Gallagher Declaration at ¶¶ 6-7; Levine Declaration at ¶¶ 7-8). Neither Special Agent Gallagher nor A.U.S.A. Levine reside in New Jersey, own real property in New Jersey, or operate a business in New Jersey. (Gallagher Declaration at ¶ 8; Levine Declaration at ¶ 11). Moreover, a search of plaintiffs central file at FCI - Fort Dix, recently ordered by this Court, confirmed that neither Special Agent Gallagher nor A.U.S.A. Levine have had any contact with the prison concerning plaintiff during the period in question (since March 1996, when officials first considered the issue of plaintiff's CCC placement). (Supplemental Munguia Declaration at ¶¶ 3-4). Plaintiff thus has not pointed to any evidence that indicates that sufficient contacts exist between New Jersey and these two defendants to justify exercising jurisdiction over those persons, and the Complaint against them must be dismissed.

In addition, as will be discussed in the following two sections of this Opinion, even if the Court had personal jurisdiction over defendants Levine and Gallagher, those parties would nonetheless be entitled to summary judgment in this case.

2. *Immunity*

Defendants argue that because they are governmental actors,

they are immune from the causes of action brought by plaintiff in this case.

Defendants first contend that Judge Bartle is absolutely immune from plaintiff's suit under the doctrine of judicial immunity. It is well-established that judicial officers enjoy absolute immunity from suits against them that are based on actions taken in their judicial capacity. The Supreme Court has consistently ruled that " 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' " *Stump v. Sparkman,* 435 U.S. 349, 355-56 (1978) (quoting *Bradley v. Fisher,* 13 Wall. 335, 351 (1872)); *see Forrester v. White,* 484 U.S. 219 (1988); *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Stump,* 435 U.S. at 359.

Judge Bartle is absolutely immune from plaintiff's suit in this case because the allegedly improper opinions offered by Judge Bartle constituted a "judicial act" on the part of the judge. Judge Bartle merely offered a sentencing-related opinion concerning a defendant who Judge Bartle himself had originally sentenced. Indeed, the BOP's guidelines explicitly mention that, in some cases, the sentencing judge should have a role in the CCC-placement determination, *see* P.S. 7310.01 ¶ 6a (1993), mandating judicial contact if the warden is considering an extended period of early CCC placement, recognizing that the sentencing judge's expectations about the sentence he or she imposed are relevant to the warden's determination. Plaintiff is precluded from recovering damages from Judge Bartle based on these judicial acts carried out by the Judge. The Court holds

that the Complaint against Judge Bartle should be dismissed in its entirety on grounds of judicial immunity.

Defendants argue that A.U.S.A. Levine and Special Agent Gallagher are also entitled to absolute immunity in this case. Defendants accurately note that prosecutors such as defendant Levine enjoy absolute immunity for their activities that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). For example, in *Imbler,* the Supreme Court affirmed the dismissal of a § 1983 suit against a district attorney who was alleged to have knowingly used perjured testimony. The Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431; *see Rose v. Bartle,* 871 F.2d 331, 343 (3d Cir. 1989); *Hauptmann v. Wilentz,* 570 F. Supp. 351, 366 (D.N.J. 1983) (citing cases), *aff'd,* 770 F.2d 1070 (3d Cir. 1985), *cert. denied,* 474 U.S. 1103 (1986). However, this absolute immunity extends only to actions taken by the prosecutor "in his role as advocate for the State," and not to actions taken in an administrative or investigative capacity. *Burns v. Reed,* 500 U.S. 478, 491 (1991).

In this case, prosecutor Levine's alleged sentencing recommendation was official conduct that is "intimately associated with the judicial phase of the criminal process," and not an administrative duty. *Imbler,* 424 U.S. at 430. Like a prosecutor's sentencing recommendation, the post-conviction recommendation should be protected by absolute immunity, to assure the vitality of such prosecutorial interest and information. Moreover, it is evident that the alleged action was taken as part of defendant Levine's role as an advocate for the United States. As discussed in *Imbler,* there are sound public policy reasons

for ensuring that prosecutors are protected from unfounded litigation that stems from the carrying out of prosecutorial "public duties" such as offering a sentencing recommendation to a court. *See id.* at 422-27. Similar reasoning demands that prosecutors be absolutely immune from liability stemming from sentencing recommendations concerning CCC placement. Thus, even if the Court accepts plaintiff's factual allegations as true, defendant Levine is immune from plaintiff's claims, and the Complaint against defendant Levine will be dismissed.

There is no legal authority, however, for granting such absolute immunity to Special Agent Gallagher. As defendants note, the Supreme Court has stated that administrative employees are absolutely immune from suit where their duties make them functionally equivalent to judicial officials who possess absolute immunity. *See Butz v. Economou,* 438 U.S. 478, 511-16 (1978). This immunity, however, was intended for persons such as administrative law judges and prosecutors, not law-enforcement officials who investigate crimes and volunteer an opinion concerning the appropriate sentence for a particular defendant. *See Graham v. United States,* 528 F. Supp. 933, 939 (E.D. Pa. 1981). Defendant Gallagher is entitled only to qualified immunity. Similarly, the BOP defendants (Hurley, McIntosh, and Langehennig) are afforded only qualified immunity in the exercise of their discretionary functions.

The qualified immunity doctrine provides that "government officials exercising discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The qualified immunity determination requires the court to perform a two-pronged

inquiry, as outlined in *Siegert v. Gilley,* 500 U.S. 226 (1991). First, the court must ascertain whether the plaintiff has alleged conduct that rises to the level of a violation of a constitutional right, and second, the court must determine whether the law was clearly established at the time of the alleged constitutional breach. *Id.* at 231-32.

In this case, the Court will assume for the sake of argument that if the denial of CCC placement for plaintiff was based on plaintiff's filing of a habeas petition, such a denial would indeed constitute a violation of a clearly established constitutional right to be free from retaliation for exercising the right of access to the courts. Even if the Court makes the assumption that defendants are not entitled to qualified immunity in this case, plaintiff's claims against defendants fail on the merits because, as discussed *infra,* the documents before the Court so convincingly demonstrate that plaintiff has not provided sufficient evidentiary support for the factual allegations contained in his Complaint.

3. The Decision to Deny Plaintiff CCC Placement in this Case

At the outset, we address the issue whether the decision of FCI - Fort Dix to deny Lloyd's placement into the community is judicially reviewable. We find, for two reasons, that this determination will not generally be reviewable absent violation of a supervening constitutional right. First, Congress has determined that the grant or denial of the special community confinement status conferred by 18 U.S.C. § 3624(c) lies within the sole unreviewable discretion of the Federal Bureau of Prisons; § 3624(c) itself is permissive, leaving to the BOP the determination of what sort of confinement will afford the

prisoner the reasonable opportunity to prepare for entry back into the community. Community confinement itself is not mentioned in the subsection and is only one option, as is continued confinement in prison. The BOP regulations likewise are permissive and highly discretionary, indicating that the Warden "may" refer inmates for suitable placement. If that were all that existed by way of statute and regulation, this Court would be well-justified in finding that only the BOP's abuse of discretion could trigger judicial review. But Congress has removed all doubt, since 18 U.S.C. § 3625 precludes judicial review under the Administrative Procedures Act for determinations made pursuant to § 3624(c). Although the foreclosure of judicial review of agency action does not deprive the Court of jurisdiction to examine whether the decision violated a right of constitutional dimension, *see Webster v. Doe*, 486 U.S. 592, 603 (1987); *Califano v. Sanders*, 430 U.S. 99, 109 (1976), we hold that Congress has foreclosed review of § 3624(c) decisions on grounds such as whether they are arbitrary, capricious, or unsupported by substantial evidence. *See Lyle v. Sivley*, 805 F. Supp. 755 (D. Ariz. 1992).[4] Accordingly, the Court need address only plaintiff's allegation that defendants' conduct violated his constitutional rights.

Plaintiff first contends that defendants' actions in this case violated plaintiff's constitutional right to equal protection of the laws. Because plaintiff does not allege that he is a member of a protected class, plaintiff's equal protection claims may succeed only if plaintiff is able to show that defendants had no

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4. Plaintiff's citation of two contrary unpublished cases, namely *Peliandini v. Warden Harvey Cox*, No. 89-5929-MRP (JR) (C.D. Cal. Dec. 28, 1989) and *Spelz v. Floyd*, No. CV-91-1387 (SVW) (EX) (C.D. Cal. 1991), is unavailing, since the discretionary wording of the statute creates no expectation of CCC placement.

rational basis for their conduct in this case. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *United States v. Hawkins*, 811 F.2d 210, 216 (3d Cir.), *cert. denied*, 484 U.S. 833 (1989). Defendants may defeat plaintiff's equal protection claim merely by presenting to the Court "any reasonably conceivable state of facts that could provide a rational basis for [defendants'] classification" of plaintiff in this case. *Heller*, 509 U.S. at 320.

As previously noted, the unrebutted evidentiary materials before the Court reveal that two factors led to the denial of plaintiff's request for community placement: 1) the severity of the underlying offense; and 2) the views of the sentencing judge, especially his opinion that plaintiff does not need halfway-house placement to ease his transition back into society. BOP officials concurred that, in view of plaintiff's strong family ties and job prospects, CCC placement would not be appropriate in this case. This evidence thus demonstrates that there was a rational and substantial basis for denying CCC placement to plaintiff. Plaintiff's equal protection claims are patently without merit.

Plaintiff also claims that defendants infringed on plaintiff's constitutional right of access to the courts. *See Hoeber ex. rel NLRB v. Local 30, United Slate Workers Ass'n*, 939 F.2d 118, 126 (3d Cir. 1991). Plaintiff argues that by causing plaintiff's furloughs to be cancelled and by denying plaintiff's request for CCC placement, defendants have hindered plaintiff's ability to prepare an effective habeas attack of his criminal conviction. Again, however, plaintiff has failed to submit evidentiary materials that demonstrate that defendants' conduct was improper. While plaintiff could set forth a claim of constitutional dimension if he showed that defendants denied plaintiff CCC placement in retaliation for plaintiff's filing of a habeas petition, *see Penrod v. Zavaras*, 94 F.3d 1399, 1404 (10th Cir. 1996),

there is no evidentiary basis on which to find that defendants were indeed driven by such a desire to retaliate. The unrebutted affidavits and declarations before the Court indicate that plaintiff's request for community placement was denied for good cause, and not to punish defendant for filing a habeas petition or otherwise invoking his right of access to the courts.

Indeed, William Langehennig and Ricky McIntosh both note that they were not even aware that plaintiff had filed a habeas petition until they were served with process in this case. (Langehennig Declaration at ¶ 3; McIntosh Declaration at ¶ 3). Moreover, as noted, the record provides no basis for concluding that A.U.S.A. Levine or Special Agent Gallagher ever offered an opinion or had any input concerning plaintiff's request for community placement. (Gallagher Declaration at ¶ 7; Levine Declaration at ¶; Munguia Supplemental Declaration at ¶¶ 3-4).

Judge Bartle obviously had a substantial impact on the decision to deny plaintiff's request for CCC placement. However, Judge Bartle's reasons for concluding that CCC placement would be inappropriate in this case, *see supra,* are supported by the record and constitute permissible justification for denying plaintiff's request by the BOP. Although plaintiff suggests that it is inappropriate for the sentencing judge to play a role in the community-placement determination, nothing in the Administrative Procedure Act or the BOP's regulations supports such a view. In fact, the BOP regulations explicitly contemplate solicitation of the sentencing judge's opinion in certain instances involving potential CCC placement, as mentioned above, for placements planned to exceed six months. *See* P.S. 7310.01 ¶ 6a. In the view of this Court, such involvement on the part of the sentencing judge should be encouraged, especially since the sentencing judge often possesses knowledge of the offender and

his criminal convictions beyond that possessed by prison officials. In this case, the record does not permit a reasonable factfinder to conclude that any defendant violated plaintiff's right to access to the courts by seeking, receiving, and considering Judge Bartle's views.

Plaintiff's final constitutional claim is that the denial of plaintiff's request for CCC placement amounted to a second punishment of plaintiff in violation of the Double Jeopardy Clause. That contention is obviously without merit. Denial of CCC placement is a denial of a benefit to a prisoner, not an imposition of further punishment, and lies well within the punishment initially imposed.

Conclusion

Plaintiff's motion for a preliminary injunction is denied and defendants' motion for summary judgment is granted because the decision to deny plaintiff CCC placement is not judicially reviewable absent a constitutional violation, and no reasonable factfinder could conclude that there has been such a constitutional violation in this case. In addition, this Court does not have personal jurisdiction over defendant Levine or defendant Gallagher. Lastly, defendant Bartle and defendant Levine are absolutely immune from the causes of action brought by plaintiff in this case.

The accompanying Order is entered, dismissing plaintiff's Complaint as to all defendants.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge